No. 602

FILE
MAR 9
CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

GALEN H. WELCH, Former Collector of Internal Revenue For the Sixth Collection District of California, *Petitioner,*

v.

OBISPO OIL COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, California,
Attorney for Respondent.

Of Counsel:
ROBERT N. MILLER,
920 Southern Bldg.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Summary of Argument	5
Argument	7
Decisions of this Court	11
Conclusion	16
Appendix	17

Table of Cases

Austin Company v. Commissioner, 35 F. (2d) 910	15
Bemis Bros. Bag Co. v. United States, 289 U. S. 28	12
Botany Worsted Mills v. United States, 278 U. S. 282	15
General Utilities and Operating Co. v. Helvering, 296 U. S. 200	15
Heiner v. Diamond Alkali Co., 288 U. S. 502	12
Helvering v. Salvage, 297 U. S. 106	15
North American Oil Consolidated v. Burnet, 286 U. S. 417	4
Oak Worsted Mills v. Commissioner, 38 F. (2d) 699	15
United States v. Factors & Finance Co., 288 U. S. 99	13
United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269	13
United States v. Henry Prentiss & Co., Inc., 288 U. S. 73	11
United States v. Supplee-Biddle Hardware Co., 265 U. S. 189	13
Welch v. St. Helen's Petroleum Co., 78 F. (2d) 631	9
Williamsport Wire Rope Co. v. United States, 277 U. S. 551	11

STATUTES

	Page
Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925	2
Revenue Act of 1917, Section 210	13
Revenue Act of 1918, Section 230	17
Section 232	17
Section 236	17
Section 236 (b)	17
Section 239	17
Section 320	19
Section 327	19
Section 327 (a)	19
Section 327 (b)	19
Section 327 (c)	19
Section 327 (d)	19
Section 328	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 602.

GALEN H. WELCH, Former Collector of Internal Revenue For the Sixth Collection District of California, *Petitioner*,

v.

OBISPO OIL COMPANY, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The first opinion of the District Court of the United States for the Southern District of California is reported in 48 F. (2d) 872; the second (R. 12-23) is not reported. The majority and dissenting opinions[1] of the Circuit Court of Appeals (R. 35-40) are reported in 85 F. (2d) 860.

[1] The dissenting opinion relates solely to a depletion question which is not in issue before this Court.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered September 28, 1936 (R. 40). The petition for certiorari was filed December 28, 1936, and was granted February 8, 1937. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Did the courts below err in correcting errors in the determination of net income and in ordering a refund of *income tax* for 1920, where the *profits tax* for that year was determined under Sections 327 and 328, Revenue Act of 1918?

STATUTE INVOLVED.

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 17-21.

STATEMENT.

The evidence introduced in the District Court is not included nor summarized in the Record before this Court, but it consisted principally of written stipulations and documentary evidence (R. 23). The Record contains the District Court's Findings of Fact (R. 12-21) concerning which no assignment of error has been made by either party (R. 26-27; 30-31). The only findings made by the trial court which bear on the question of special assessment here involved were as follows (R. 21):

> "The Commissioner of Internal Revenue determined the profits taxes of Plaintiff for the calendar year 1920 under the provisions of Sections 327 and 328, Revenue Act of 1918, in the total amount of $142,765.73, or at the rate of 9.67 per cent of Plaintiff's income, subject to profits tax, of $1,476,330.52 for that year. The Commissioner determined the income tax of Plaintiff for 1920 as follows:

Net income		$1,476,330.52
Less:		
Profits tax, Section 328...	$142,765.73	
Interest on U. S. obligations not exempt.....	86,134.16	
Exemption	2,000.00	230,899.89
Balance subject to 10% tax.....		$1,245,430.63
Amount of tax at 10%		124,543.06."

In the courts below the foregoing determination by the Commissioner of "net income" in the sum of $1,476,330.52 was held to be erroneously high, and the courts' finding as to such errors of the Commissioner in determining net income is not challenged by either party before this Court. The controversy in this Court relates entirely to the "credit" of $142,765.73 which the Commissioner allowed, as above shown, and which the courts have treated as allowable in this case. This credit is claimed by respondent and was allowed by the Commissioner and by the courts under Section 236, Revenue Act of 1918, which in effect provides that after the determination of net income and before the application of the income tax rate, there shall be allowed three types of credits: (a) certain interest on obligations of the United States and on War Finance Corporation bonds; (b) taxes imposed by Title III of the Revenue Act of 1918 (profits taxes); and (c) a specific credit of $2,000.00.

Other pertinent findings of fact may be summarized briefly as follows:

During the period from March 11, 1914 to November 29, 1920, respondent was engaged in litigation with the United States Government concerning its right, title and interest in certain oil lands in California (R. 14, 17). Throughout said period a receiver appointed by the District Court was in charge of the property with direction to impound the proceeds therefrom pending termination of the litigation (R. 14). During 1920, the litigation was settled in accordance with an act of Congress (R. 16-17). Pursuant to said

settlement, respondent paid certain amounts and delivered a quit-claim deed to the United States Government, and in return received a lease from the Government, together with a release of all the impounded funds (R. 16-17). The Commissioner of Internal Revenue held that said released funds, after certain depletion deductions, constituted taxable income of respondent for 1920, increased the taxable net income by $1,378,077.32, and assessed and collected additional income and profits taxes thereon (R. 17-18).

Thereafter respondent filed in the manner provided by law a claim for refund of the additional taxes so determined and paid, setting forth several grounds for recovery (R. 18-19). The claim was rejected by the Commissioner of Internal Revenue and in due course the complaint in the present suit was filed (R. 19).

At the first trial the District Court entered judgment for respondent herein in the full amount claimed, on the ground that the impounded funds constituted taxable income for the various years in which they were produced. An appeal was taken by petitioner herein to the Circuit Court of Appeals for the Ninth Circuit. Thereafter this Court handed down its decision in *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417. Counsel for both parties agreed that under said decision of this Court the impounded funds received by the respondent constituted taxable income for the year here in question and that the judgment of the District Court ought to be changed in that respect. Accordingly, the case was referred back to the District Court for correction of the holding on this point and for consideration of other issues.

The District Court found that respondent's net income as determined by the Commissioner was excessive in the net amount of $40,102.44, based on various overstatements and understatements, of items connected with the litigation referred to (R. 22). The District Court determined that it had jurisdiction to the extent of determining the correct amount of *income tax* (R. 21), and entered judgment in

favor of respondent in the amount of $4,010.24, representing the income tax at the rate of 10 per cent on the net overstatement of $40,102.44 (R. 22).

Respondent in due course perfected an appeal to the Circuit Court of Appeals based on several assignments of error, including a claim for an additional depletion allowance of $516,598.10 (R. 26-29). Thereafter, petitioner herein perfected a cross-appeal based principally on the contention that the District Court had no jurisdiction over the subject matter of the action[2] (R. 29-33).

The Circuit Court of Appeals held that respondent was entitled to the additional depletion allowance of $516,598.10 claimed by respondent (R. 37-38) and also held that the trial court had jurisdiction to redetermine the income tax on the basis of the corrected net income (R. 39). The total of the adjustments by the District Court ($40,102.44) and by the Circuit Court of Appeals ($516,598.10) indicated that the Commissioner had overstated net income by $556,700.54.

SUMMARY OF ARGUMENT.

The courts below determined that the Commissioner's computation of respondent's "net income" for purposes of the income tax ($1,476,330.52) was excessive to the extent of $556,700.54. In the determination of said "net income" and in the determination of the income tax at the rate of

---

[2] The exact language of the assignment of error was as follows (R. 30):

> "The Court erred in rendering judgment against the Defendant and in favor of the plaintiff herein for the reason that the Court has no jurisdiction over the subject matter of this action, the tax sought to be recovered having been determined and assessed by the Commissioner of Internal Revenue of the United States under the special assessment provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093)."

This statement that this tax has been determined under the special assessment provisions is incorrect since the "tax sought to be recovered" was an *income tax* (Title II, Revenue Act of 1918) whereas the taxes "determined and assessed by the Commissioner of Internal Revenue of the United States under the special assessment provisions of Sections 327 and 328" (Title III, Revenue Act of 1918) were *profits taxes*.

10 per cent under Title II, Revenue Act of 1918, no discretionary power has been entrusted to the Commissioner. Likewise, no uncertainties or administrative difficulties are involved. Accordingly, a refund of the income taxes so overpaid is proper.

Petitioner contends that errors in the computation of net income may not be corrected for purposes of the *income tax*, this, on the ground that the *profits tax* allowed as a credit thereon was determined by the Commissioner under the special assessment provisions. This contention, if upheld, would penalize petitioner unreasonably, taxing it upon a "net income" admittedly excessive, in the net, by $556,700.54, merely because of a credit claimed, in the lesser amount of $142,765.73. Furthermore, said amount of $142,765.73 is the amount of profits tax actually and finally "imposed by Title III" and, as such, is expressly allowable as a credit. It is immaterial and irrelevant whether the Commissioner, in determining the amount of the profits tax, did so under one or another of the provisions of Title III. The method of determining that tax is not an issue in this case.

Even if in this case the respondent had failed to prove any amount whatever in respect to this credit, this failure to take advantage of a credit allowed for his benefit would not impair his right to have greater errors in the determination of net income corrected, or defeat the jurisdiction of the courts. The credit for excess profits tax could not be less than zero; assuming that figure were found by the Commissioner, or assuming that the respondent waived entirely his right to this credit, the taxpayer is still shown to have made an overpayment of income tax, in a definite and substantial amount.

Congress has expressly provided for only two methods of final determination of the income tax, (1) by formal closing agreements and (2) by accepted offers in compromise. The finality of other determinations is not lightly to be inferred from general provisions of the law. Title II, imposing an income tax, and Title III, imposing a profits tax,

are entirely separate and distinct. The fact that the amount of the profits tax determined under Sections 327 and 328 is not subject to review by the courts fixes with finality the amount deductible as a credit under Section 236.

This Court has recognized in several cases that the courts do not lose jurisdiction of refunds relating to income tax, merely because the profits tax was determined under special assessment. In no case has this Court expressed an opinion that the courts are devoid of such jurisdiction.

ARGUMENT.

The Commissioner of Internal Revenue determined that respondent's "net income" for income tax purposes, before credits and exemptions, was $1,476,330.52. The court below has held that said determination was overstated in the net amount of $556,700.54 because of inclusions of items not taxable as income, together with the exclusion of deductions expressly allowed by the statutory provisions. The court below further held that respondent is entitled to a refund of the income tax, at the fixed statutory rate of 10 per cent, erroneously assessed and collected by reason of said net overstatement of net income.

As shown in the Statement, there is no issue in this case as to the correctness of the foregoing adjustment nor as to the actual finding by the Commissioner that the amount of the credit for profits tax allowable under Section 236(b) is $142,765.73, nor as to any other amount necessary for the calculation of the income tax. The only contention of the petitioner herein, and the only contention open to him in this case, is that merely because the figure of $142,765.73, determined by the Commissioner as the amount of the credit, was determined by him under Sections 327 and 328, the courts are completely without jurisdiction of the subject-matter. Apparently he bases this contention upon the possibility that the Commissioner's determination of that figure is erroneous, although nothing has been proved in

this case by either party which would warrant the courts in refusing to be bound by this official determination.

Under this contention an alleged uncertainty over the amount of a credit of only $142,765.73 would be allowed to prevent the correction of now admitted errors by the Commissioner in the much greater amount of $556,700.54. The very statement of the contention emphasizes its unfairness and illogical character. Even if the Commissioner's determination as to the amount of this credit were disregarded, and the record regarded as failing to support any credit whatever, the overstatement of the income tax would still be apparent.

At the outset, it should be noted that in the Revenue Act of 1918 Congress provided eleven different types of taxes, each under a separate "title."[3] The refund determined by the courts below pertains solely to the tax imposed by Title II, entitled "Income Tax." The profits tax allowed as a credit under Section 236 (b) is that imposed by Title III, entitled "War-Profits and Excess-Profits Tax." Section 327 specifies four types of situations in which the profits tax shall be determined, as provided in Section 328, by comparison with rates paid by representative corporations engaged in a like trade or business. The profits tax of respondent for the taxable year in question was determined under the provisions of Sections 327 and 328, in the amount of $142,765.73.

Under three of the situations prescribed in Section 327, described in subdivisions (a), (b) and (c), special assessment under Section 328 is mandatory upon the Commissioner, while in only one subdivision, (d), is it left to the discretion of the Commissioner. See *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28. Petitioner states (Br. 5-6) that special

[3] Examination of the Revenue Act of 1918 discloses that with the exception of Title I, XIII and XIV, which contain "General Provisions", each of the other eleven titles covers a different form of tax, and that they are mutually independent. There would appear to be no reason why Congress should intend that the method of computation of the tax imposed under one title should preclude the review and revision of the tax imposed under any other title.

assessment in the present case was granted under the discretionary powers of the Commissioner under subdivision (d). Respondent takes issue with this statement and submits that it is not substantiated by the record in the case. The finding of the trial court is merely that the profits taxes were determined "under the provisions of Sections 327 and 328, Revenue Act of 1918," without reference to any particular subdivision. (R. 21). If petitioner thought that the evidence in the trial court justified a finding that the Commissioner acted under subdivision (d), he should have requested a finding to that effect. The absence of such a finding or any request therefor indicates that the evidence would not support that finding. That the courts below were justified in assuming jurisdiction if special assessment was founded upon the mandatory subdivisions, apparently is conceded by petitioner (Br. 10-11, citing *Welch* v. *St. Helen's Petroleum Co.*, 78 F. (2d) 631).

However, even if this Court assumes, despite the foregoing that respondent's profits tax for 1920 was determined under special assessment pursuant to the discretionary provisions of subdivision (d), there still is no basis, either in the statute or in equity, for denying jurisdiction in the courts below to order the refund of the entirely distinct income tax illegally collected with respect to admitted overstatements of the statutory "net income."

As shown by the statutory provisions set forth in the Appendix, the income tax imposed by Title II and the profits tax imposed by Title III are separate taxes, the provisions as to each being self-contained. The only way in which the determination of the profits tax imposed by Title III becomes material in determining the income tax imposed by Title II is that the amount of tax imposed by Title III is "allowed" as a credit against the net income determined under Title II, before the tax percentage is applied.

This is not one of the cases in which it is sought to force an unwilling Commissioner to determine the profits tax by invoking any particular method prescribed in Title III, nor

is it a case in which the taxpayer is criticizing or seeking to change a determination made by the Commissioner under Title III. In this case, since the Commissioner determined the profits tax under Sections 327 and 328, he did indeed exercise discretionary powers and the courts below have properly recognized their duty to accept the result of the exercise of such discretion as final. Therefore while in the calculation of the income tax the taxpayer is allowed a credit in an amount equal to the determination which the Commissioner has made, the Commissioner's discretionary powers were exhausted when the profits tax was imposed. That figure being fixed, the calculation of the income tax involves no discretion on his part.

The intention of Congress in allowing credits against the net income before the application of the income tax rates was obviously to benefit the taxpayer and not the Government, since in no event could the allowance of these credits operate to increase the income tax. Therefore it is unreasonable to adopt any construction of the law under which the allowance of the profits tax credit would be considered as so essential an element in the computation of the tax that the taxpayer should be deprived of all other adjustments in the event there is uncertainty as to this particular item. If a taxpayer, for instance, failed to introduce into a record the necessary proof with regard to the credit allowable under the same section for interest on Government obligations, this would not prevent the court from giving him relief from overdeterminations of net income by the Commissioner in other respects. So, here, if there were nothing in the record to show what credit the taxpayer was entitled to in respect to profits taxes, the courts still have full jurisdiction to correct the overstatements of net income and award refunds to that extent. In other words, the severest penalty attached to uncertainty or lack of proof as to the amount of any credit should be the exclusion of such credit, just like any other claimed deduction, in computing the amount of the income tax. In the present case, even if Congress

had not provided any credit whatever for profits taxes, respondent admittedly would be entitled to a substantial refund. Surely Congress did not intend that a credit or deduction provision should deprive the courts entirely of jurisdiction with respect to any phase of income taxes.

Decisions of this Court.

None of the various decisions of this Court cited in petitioner's brief bear out his contention that the courts are without jurisdiction to entertain a suit for the recovery of *income taxes* merely because the *profits taxes* were determined under a special assessment. In *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, this Court held that the Court of Claims could not review a determination by the Commissioner, under the discretionary powers granted in Section 327(d), that the taxpayer was not entitled to special assessment of its profits taxes. After pointing out the administrative difficulties which would be involved in such a review by the courts, this Court said (p. 562):

> "• • • We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities."

In that case, no question was raised as to the correctness of the Commissioner's determination of the statutory "net income" or of the income tax thereon, which are the only issues here in question. Furthermore, in the present case, the Commissioner determined the profits tax under a special assessment and neither party to this appeal questions the propriety of such action.

In *United States* v. *Henry Prentiss & Co., Inc.*, 288 U. S. 73, the taxpayer attempted, after expiration of the period within which a claim for refund could be filed, to transform, by amendment, a claim based upon an application for spe-

cial assessment into a claim for revision of the profits tax by increasing the amount fixed for *invested capital*. This Court held that could not be done.[4] In that case no question was raised as to the correctness of the Commissioner's determination of the net income and of the income tax.

In *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, this Court held that the courts could not change the Commissioner's determination of the profits tax under special assessment even if the net income used in such determination was excessive. No issue was raised in that case as to the trial court's revision of the income tax on the basis of the corrected net income.[5] In the present case, the courts below made no change whatever in the Commissioner's determination of the profits tax but adopted it for all purposes.

The above cases are the only decision of this Court cited by petitioner in support of its contentions herein. In each of them the only issue raised related to the determination of the profits tax and in none of them did this Court hold, directly or indirectly, that the Commissioner's determination of the income tax was not subject to review. On the contrary, the Court's decision in the *Diamond Alkali Co.* case, reversing the lower courts' revision of the profits tax with-

---

[4] In *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28, 32, Mr. Justice Cardozo, who rendered the opinion in the *Prentiss* case, said:

> "We held in United States v. Prentiss & Co., supra, that after the period of limitation a claim for a special assessment under Section 327(d) may not be turned by amendment into one for the reaudit of invested capital and for the reassessment of the tax accordingly."

[5] On page 12 of the Solicitor General's brief before the Supreme Court in that case the following statement appears:

> "Petitioners do not question here the action of the courts below in reducing the *normal income tax* by increasing the deductions from gross income and applying to the reduced net income the normal tax rate prescribed by the statute. The questions presented to this Court in the instant case relate only to *profits taxes*. Attention, however, is called to the fact that there is a necessary correlation between the profits tax and the income tax since, under Sec. 236(b) of the statute, the amount of the former is allowed as a credit against net income in computing the latter."

If this Court had considered that the lower courts were without jurisdiction to review even the computation of income taxes, it presumably would have so held even though that issue was not raised directly on the Government's appeal.

out reversing their revision of the income tax, indicates at least that the courts are not devoid of jurisdiction to review the income tax upon the basis of proved errors in the determination of "net income."

Furthermore, other decisions by this Court recognize that the courts have such jurisdiction. In *U. S.* v. *Factors & Finance Co.*, 288 U. S. 89, decided on the same day as the *Prentiss* case, this Court held that a general claim for refund not specifying grounds might be amended after the period of limitation by claiming a special assessment under Section 210 Revenue Act of 1917. In that case, it is true, the Commissioner had determined a revision of the profits tax under special assessment and the only issue before this Court related to the sufficiency of the amendment to the claim for refund. However, if jurisdiction were lost by the courts wherever a taxpayer makes application for special assessment, as petitioner contends, this Court presumably would have refused to review the matter at all. See also *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269.

In *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189, this Court affirmed a judgment of the Court of Claims allowing a refund of both income and profits taxes to a taxpayer whose profits tax had been determined under special assessment, where the only issue raised was the correctness of the Commissioner's determination of net income. Petitioner concedes (Br. 10) that the question here involved was present in the *Supplee-Biddle Co.* case, but attempts to distinguish the decision on the ground that this question was not submitted to the Court for decision. However, the fact is that this Court fully understood the situation[6] and if there had been any doubt as to the jurisdiction

---

[6] In its opinion, at page 193, this Court said:

"The Commissioner of Internal Revenue reduced this amount by $29,584.06 in accordance with the powers conferred upon him by Sections 327 and 328 of the Revenue Act of 1918 to reduce the rate of taxation in cases of unusual hardship. There remained, however, the sum of $55,153.89, which tax the appellees paid under protest, and for this with interest, the Court of Claims gave judgment to the appellee."

of the courts, it presumably would have dismissed the case. Accordingly, that decision, which approved a refund of profits taxes as well as income taxes, goes far beyond the action of the courts below in ordering a refund of income taxes only, in the present case.

We respectfully submit that the decisions of this Court do not rest upon the lack of *jurisdiction* in the courts to review cases in which the taxpayer has applied for special assessment, but upon an admitted principle of law that the courts will not revise a determination by the Commissioner of the profits tax under special assessment or review his determination that special assessment should not be applied. In both of these situations the Commissioner has been granted discretionary powers which would be very difficult to review. In view of these administrative difficulties, it is reasonable to assume that Congress did not intend that such decisions should be changed by the courts, in the absence of fraud or other irregularities. Where, however, it is not necessary for the courts to pass upon the propriety of special assessment or to review the actual determination of special assessment, this Court has recognized not only the inherent jurisdiction, but also the power of the courts to review the case and to take appropriate action.

In the present case, no administrative difficulties are involved. Following the decisions of this Court, the courts below have made no change whatever in the profits tax determination by the Commissioner, but on the contrary have treated it as final and not subject to review. Petitioner's objections properly relate only to the propriety of the courts' action in allowing as a credit under Section 236(b) the amount of profits tax actually determined and collected by the Commissioner under the provisions of Title III. We submit that such action was proper, since the profits tax so collected was the amount of taxes actually "imposed by Title III for the same taxable year" and therefore comes within the express provisions of Section 236 (b).

However, if there were any question or uncertainity as to the correct amount of the profits taxes imposed by Title III, we submit that the remedy is to disallow the credit entirely for lack of proof, not to refuse to correct other and larger errors in the computation. This "credit" does not enter into the computation of "net income" but is merely deducted therefrom, along with other credits applied by law, before applying the fixed statutory rate of 10 per cent for the income tax. In this case, the Commissioner admittedly overstated "net income" by $556,700.54. Even if the entire credit for profits taxes were disallowed, the amount subject to the income tax would be reduced by $413,934.81 with respect to items concerning which the statutory provisions are mandatory and to no extent discretionary.

Congress has expressly provided definite methods of final determinations of income and profits taxes (a) through final agreements in writing made by a taxpayer and the Commissioner, with the approval of the Secretary, and (b) through compromises approved by the Secretary of the Treasury and the Attorney General. See *Botany Worsted Mills* v. *United States*, 278 U. S. 282. Neither method was followed in the present case. Petitioner argues, in effect, for still another method not provided by Congress, to wit, the mere application by a taxpayer for special assessment of profits taxes.[7] As this Court stated in the *Botany Worsted Mills* opinion, at page 288:

> "We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of

[7] It should be noted that the Commissioner does not consider the determination of income and capital binding on the Department, even though acquiesced in by the taxpayer. See *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, and *Oak Worsted Mills* v. *United States*, 38 F. (2d) 699. In the present case, petitioner apparently does not claim that respondent acquiesced in the Commissioner's determination of net income. In any event, no such conclusion is justified by the record herein. Neither in the District Court nor in the Circuit Court of Appeals was any question of estoppel raised by petitioner herein. See Brief for the Respondent in Opposition, pp. 3-5. Accordingly, even if otherwise relevant, such an argument should not be considered in this case. *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Salvage*, 297 U. S. 106, 109.

> the Commissioner and the Secretary, and prescribing the formality with which as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

This is a case in which the Commissioner, as held by the courts, made an erroneous determination of net income—a determination involving no discretion. The petitioner's argument that this error must stand uncorrected for income tax purposes, merely because the taxpayer was entitled to and received treatment under Sections 327 and 328 as to its profits tax, imputes to Congress an unreasonable intention.

If in this case the Commissioner's overstatement of net income cannot be reviewed and corrected at the taxpayer's instance, it is unique in the system of corrective justice set up by the tax laws. As stated by the Court below (R. 39):

> "The Commissioner's discretion extends to the amount of this particular credit, and not to the right to claim deductions. A contrary holding would permit the Commissioner to enforce the statute or refuse to enforce it, according to his will, contrary to the intention of Congress."

CONCLUSION.

The decision below is correct and should be affirmed.

Respectfully submitted,

JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, California,
Attorney for Respondent.

Of Counsel:
ROBERT N. MILLER,
920 Southern Bldg.,
Washington, D. C.

APPENDIX.

Revenue Act of 1918, 40 Stat. 1057:

TITLE II—INCOME TAX.

Part III.—Corporations.

Tax on Corporations.

Sec. 230. (a) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and

(2) For each calendar year thereafter, 10 per centum of such excess amount.

Net Income Defined.

Sec. 232. That in the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226.

Credits Allowed.

Sec. 236. That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

(a) The amount received as interest upon obligations of the United States and bonds issued by the War Finance Corporation, which is included in the gross income under section 233;

(b) The amount of any taxes imposed by Title III for the same taxable year: *Provided,* That in the case of a corporation which makes return for a fiscal year beginning in 1917 and ending in 1918, in computing the tax as provided

in subdivision (a) of section 205, the tax computed for the entire period under Title II of the Revenue Act of 1917 shall be credited against the net income computed for the entire period under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, and the tax computed for the entire period under Title III of this Act at the rates prescribed for the calendar year 1918 shall be credited against the net income computed for the entire period under this title; and

(c) In the case of a domestic corporation, $2,000.

Corporation Returns.

Sec. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer. If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (c) of section 236 shall be reduced to an amount which bears the same ratio to the full credit therein provided as the number of months in the period for which such return is made bears to twelve months.

TITLE III—WAR-PROFITS AND EXCESS-PROFITS TAX.

Part IV.—Net Income.

Sec. 320. (a) That for the purpose of this title the net income of a corporation shall be ascertained and returned—

* * * * * * * * * * *

(3) For the taxable year upon the same basis and in the same manner as provided for income tax purposes in Title II of this Act.

Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made

between April 6, 1917, and November 11, 1918, both dates inclusive.

Sec. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a) containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.